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In the

SUPREME COURT OF THE UNITED STATES

TAHOE-SIERRA PRESERVATION COUNCIL, INC.,
Petitioners,

v.

TAHOE REGIONAL PLANNING AGENCY,
Respondent.

On Writ of Certiorari
To the Court of Appeals for the Ninth Circuit

BRIEF OF THE STATES OF VERMONT, ALASKA, ARIZONA, CONNECTICUT, FLORIDA, HAWAII, IOWA, LOUISIANA, MARYLAND, MASSACHUSETTS, MONTANA, NEW JERSEY, NEW YORK, NORTH CAROLINA, OKLAHOMA, OREGON, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, TEXAS, AND WASHINGTON AND THE COMMONWEALTH OF PUERTO RICO, AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Court of Appeals properly determined that a temporary moratorium on land development does not constitute a taking of property requiring compensation under the Takings Clause of the United States Constitution?

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INTEREST OF THE AMICI CURIAE

The States and their local governments bear primary responsibility for the Nation's land use planning and resource management efforts. This case calls into question the constitutionality of a vital planning tool: the short-term development moratorium. States and local governments use temporary moratoria to address urgent and serious planning problems, including environmental concerns, traffic hazards, and excess demand for basic services. Temporary moratoria can be a critical tool for effective planning, because moratoria preserve the status quo while citizens and lawmakers develop appropriate, reasoned responses to the problems associated with development.

A categorical rule that any temporary ban on development is a "taking," regardless of its purpose, duration, or effect on property values, would greatly reduce the ability of State and local governments to manage development in ways that protect the environment and public health, increase property values, and benefit the public as a whole. Such a rule would also impose significant financial burdens on State and local taxpayers, who may have to compensate property owners for minor delays and fluctuations in value caused by past and current moratoria. The amici States have a keen interest in defending the use of reasonable, short-term development moratoria as an element of the land use planning process.

INTRODUCTION AND SUMMARY OF ARGUMENT

Although petitioners and their amici seek to engage this Court in the tortured history of this litigation, the Court has chosen to address a single issue: whether a *temporary* moratorium on development is a categorical taking. This issue cannot be limited to the context of the Tahoe Basin and the restrictions placed on petitioners' property. In urban, suburban, and rural areas of the country, lawmakers from time to time find it necessary to impose temporary bans on development to address pressing problems of all kinds, from an overwhelmed sewer system to traffic congestion. Numerous state and federal courts have concluded that reasonable temporary moratoria are not takings. The amici States urge this Court to uphold the decisions of these courts and the Court of Appeals below, for two reasons.

First, temporary moratoria are an accepted and necessary part of the planning process, because they permit communities to respond to urgent problems and because they facilitate the planning process. The existing legal framework allows flexibility in the planning process while placing sufficient restrictions on the use of moratoria to protect the legitimate interests of property owners.

Second, a rule that any short-term ban on development is a *per se* taking would be a significant departure from this Court's precedents. By definition, a temporary ban on development involves neither a

physical intrusion nor a total deprivation of value. The Court's reasoning in cases such as *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), cannot easily be extended to apply to a temporary regulation that has only a minor impact on property values. Although petitioners place substantial reliance on *First English Evangelical Church v. County of Los Angeles*, 482 U.S. 304 (1987), that case addresses only the remedial issue of compensation for a regulatory taking. It does not support a rule that a moratorium designed to be temporary necessarily works a taking of property.

ARGUMENT

I. TEMPORARY MORATORIA ARE AN ACCEPTED AND CRITICAL ELEMENT OF THE LAND USE PLANNING PROCESS

A. State and local governments use temporary moratoria as a reasonable response to serious problems.

In a perfectly managed and predictable world, temporary moratoria would be unnecessary. Well-trained, fully funded professional planners would develop long-term plans that would fully anticipate every possible change a community might experience. Municipal services would never be stressed, traffic would remain forever manageable, open spaces would not be threatened, environmental problems would not develop. But we do not live in such a world. In this world, most land use planning is handled by local officials with little time and less money. Citizen boards make valiant efforts to develop long-term plans for their communities, but they are often hampered by lack of information and resources. And this world, most evidently, is not predictable. Change may come quickly, and local communities may be unprepared for the consequences. State and local governments need tools to respond to change while protecting important community interests, including property values.

A temporary moratorium – a short-term ban on development – is one such tool. Temporary moratoria "freeze" the status quo, preventing further harm while the community studies the problem and prepares a response. Communities have used moratoria

(sometimes called "interim" or "stop-gap" zoning) for decades, with the approval of state and federal courts. *See, e.g., Fowler v. Obier*, 7 S.W.2d 219 (Ky. 1928) (upholding emergency ordinance limiting issuance of building permits pending comprehensive zoning plan); *Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n*, 400 F. Supp. 1369 (D. Md. 1975) (upholding five-year moratoria on sewer connections). Both reported decisions of the lower courts and scholarly writings on the subject evidence a widely accepted view that, properly used, temporary moratoria are an appropriate response to serious concerns. *See, e.g.*, Norman Williams, Jr. & John H. Taylor, 1 *American Planning Law* §§ 30.01-.05 rev. 1988) (discussing issue and collecting cases); Kenneth H. Young, 1 *Anderson's American Law of Zoning* § 5.24 (1996 ed.) (same); Patrick J. Rohan, 3 *Zoning & Land Use Controls* §§ 22.01-22.04[2] (Eric Damian Kelly ed., rev. 2001) (same).

Perhaps the most common reason for a temporary moratorium is an unexpected surge in development or change in development patterns that prompts a community to reexamine its planning efforts. *See, e.g., Almquist v. Town of Marshan*, 245 N.W.2d 819, 825-26 (Minn. 1976) (upholding six-month moratorium where small-town board "was confronted with four developers proposing plans which would have a profound effect on economic, esthetic, and engineering problems for many years to come"). Development may threaten the traditional rural character of an area, as farms and open space disappear. *See id.* at 827-28 (following moratorium, town adopted zoning for agricultural preservation); *Zilber v. Town of Moraga*, 692 F. Supp.

1195, 1206-07 (N.D. Cal. 1988) (upholding town's one and a half year moratorium, pending open space study). Commercial growth may also pose new challenges for an urban area, as, for example, when incompatible uses encroach upon a historical district. *See Schafer v. City of New Orleans*, 743 F.2d 1086, 1088, 1090 (5th Cir. 1984) (upholding city moratorium on fast-food development in "picturesque" and "historically important" neighborhood); *see also Williams v. City of Central*, 907 P.2d 701, 705-06 (Col. Ct. App. 1995) (approving city's ten-month moratorium on development in gambling district, pending study on city's ability to absorb growth spawned by legal gambling). Faced with development pressures, communities have traditionally used interim controls, including moratoria, to "inhibit or prevent new growth while an area is being studied" for initial or revised zoning. Rohan, 3 *Zoning & Land Use Controls* § 22.01[1], at 22-5.

Rapid development may also outpace available municipal services. *See id.* § 22.01[2], at 22-8 (communities may temporarily deny development where public services are overloaded). Temporary bans on new sewer connections have been justified by pressing public health concerns, as growing populations overwhelmed existing systems. *See, e.g., Smoke Rise,* 400 F. Supp. at 1373, 1383 (upholding sewer moratoria based on inadequate facilities and discharges of untreated sewage into waterways); *Brazos Land, Inc. v. Board of County Comm'rs*, 848 P.2d 1095, 1096, 1101 (N.M. Ct. App. 1993) (upholding nine-month moratorium on subdivision approvals designed in part to allow time to promulgate more

stringent waste disposal requirements). Potential water shortages have prompted temporary development moratoria. *See Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1237 (9th Cir. 1994) (approving one-year moratorium in light of drought conditions and estimates of city water shortages if additional development was approved). And, aside from immediate public health concerns, the demand for city services and new infrastructure may expand faster than the tax base, resulting in budget and tax problems that require additional time for resolution.

Along with overwhelming municipal services, rapid development may overwhelm the local highway system. Towns and cities have to cope with frustrating delays and possibly dangerous conditions caused by traffic congestion – conditions that will only worsen if development continues before road improvements are possible. Not surprisingly, some cities have used temporary moratoria to gain sufficient time to address traffic problems. *See, e.g., Woodbury Place Partners v. City of Woodbury*, 492 N.W.2d 258 (Minn. 1992) (holding that city's two-year moratoria on development near highway interchange, pending traffic study, was not a categorical taking).

Other public health and safety concerns provide additional bases for interim bans on development. For example, in a case that this Court already knows, the County of Los Angeles adopted an interim ban on development in a flood plain following a devastating, lethal flood. *First English Evangelical Lutheran Church v. County of Los Angeles*, 258 Cal. Rptr. 893, 895 (Cal. Ct. App. 1989). On remand from this Court, the California appellate court concluded in part that

the ordinance was a reasonable temporary measure that permitted the county to "conduct an extensive study" to determine "what, if any, structures and uses would be compatible with the preservation of life and health of future occupants." *Id.* at 906. A New Jersey court similarly approved a moratorium on development in a flood plain pending construction of a flood-control project. *Cappture Realty Corp. v. Board of Adjustment*, 336 A.2d 30 (N.J. Super. Ct. App. Div. 1975).

Finally, serious environmental concerns such as those facing Lake Tahoe may justify temporary limits on development. No one disputes that Lake Tahoe was at substantial risk of irreparable harm from continued uncontrolled development. The situation was sufficiently serious that Congress in 1980 approved amendments to the Tahoe Regional Planning Compact that directed the Tahoe Regional Planning Agency to establish environmental threshold carrying capacities and to develop a new regional plan. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 216 F.3d 764, 766-68 (9th Cir. 2000). Environmental harm can be difficult or impossible to remedy, and it is not unreasonable for a planning agency to put a temporary halt to damaging development while studying the problem and looking for a solution. *See* Rohan, 3 *Zoning & Land Use Controls* § 22.01[1], at 22-5 (interim controls may be used to protect "areas perceived to be environmentally sensitive").

What these cases from across the country show is that local communities are struggling with serious problems caused by development, and that temporary moratoria are one step communities can take to

prevent significant harm. The cases do not reveal a pattern of governmental abuse, but of responsible behavior: a new problem prompts a short moratorium, the problem is studied, zoning ordinances or other regulations are changed, and the moratorium is lifted. *See, e.g., Zilber*, 692 F. Supp. at 1197 (moratorium expired after one and a half years; town studied zoning for ridge and hillside open space and enacted new ordinance); *Williams v. City of Central*, 907 P.2d at 703 (moratorium repealed after ten months, when growth studies completed); *Almquist,* 245 N.W.2d at 822, 825 (moratorium lasted seven months; town consulted with professional planners and developed comprehensive zoning ordinance); *Woodbury Place Partners*, 492 N.W.2d at 260 (moratorium expired after two years; city enacted moratorium in part to prohibit construction that would adversely affect road design and public health and safety). Without question, temporary development moratoria have an established and important role in the dynamic process of land use planning.[1]

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[1] As set forth in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978), a court reviewing a regulatory takings claim must consider, among other factors, the "extent to which the regulation has interfered with distinct investment-backed expectations." An existing regulatory regime "helps to shape the reasonableness of those expectations." *Palazollo v. Rhode Island*, 121 S. Ct. 2448, 2466 (2001) (O'Connor, J., concurring). The common use of temporary moratoria in a jurisdiction thus may bear on whether a property owner can show that a short-term ban on development interfered with her reasonable expectations. *See id.* at 2467 (noting the relevance of the "regulatory backdrop" to a takings inquiry).

B. Temporary moratoria protect and improve the planning process.

The "commendable task of land use planning," *Dolan v. City of Tigard*, 512 U.S. 374, 396 (1994), requires, at a minimum, careful study and citizen involvement. *See generally* Robert H. Freilich, *Interim Development Controls: Essential Tools for Implementing Flexible Planning and Zoning*, 49 J. Urban Law 65 (1971) (stressing need for intelligent planning process, including debate and citizen participation). Temporary moratoria are a critical element in the planning process, because they provide time for the process to work. They do so in at least two ways: by preventing a "race" to development when property owners learn that land use restrictions may be changed and by preventing a problem from getting significantly worse before it can be addressed.

Courts have long recognized that temporary moratoria protect a community's long-term development goals by preventing a race to development. In 1925, the Supreme Court of California upheld an emergency ban on building multifamily housing, noting that a comprehensive zoning plan "will take much time to work out" and that it would be "destructive of the plan" to permit certain construction "during the period of [the plan's] incubation." *Miller v. Board of Public Works*, 234 P. 381, 388 (Cal. 1925). Property owners who know that land use restrictions may be changed have an incentive to accelerate the pace of development, and that development in turn may

thwart the goals of the planning process. *See, e.g.*, Freilich, 49 J. Urban L. at 78-79 (zoning effort may prove futile as developers rush to build nonconcorming uses); Rohan, 3 *Zoning and Land Use Controls* § 22.01[1] ("[d]evelopers race to beat the imposition of new controls").

Without temporary moratoria as an option, local officials face a difficult choice. Public participation and investment in the planning process is both critical to its success and fundamental to our democratic society. *See, e.g.*, Young, 1 *Anderson's American Law of Zoning* § 5.24 ("validity of the plan and the success of its implementation depend in large measure on criticism, advice, and support [which in turn rest] upon wide public understanding"). But public dissemination of planning goals and potential zoning changes may prompt a race to develop that will have an adverse effect on the community's long-term interests. As a result, planning officials may feel pressure to limit the opportunity for public comment, to protect the overall goals of the planning process. Temporary moratoria provide a safety valve in this situation, by preventing inappropriate development while the community has a full democratic debate over its future.

The second reason temporary moratoria serve a critical purpose is the simple truth that problems worsen over time, and solutions become more difficult and more expensive. Lake Tahoe itself teaches this lesson. If we had known in the 1950s what we know now about Lake Tahoe, the affected communities would have been able to control and plan development to avert eutrophication of the lake. The same principle governs other problems. As traffic congestion increases,

so do the delays and disruption caused by roadwork and expansion projects. Coping with contamination of waterways from raw sewage is more expensive than halting development while sewer capacity is increased.

Temporary moratoria may allow time not only for simpler, less expensive solutions but also for creative approaches to problems caused by development. When a problem first begins to emerge, a community may have various options to address it. For example, a community concerned about vanishing open space might consider a package of zoning changes, tax credits, and grants from outside sources to purchase critical empty land. *See generally* JoAnne L. Dunec, *Economic Incentives: Alternatives for the New Millenium*, 12 Natural Resources & Env. 292 (Spring 1998) (discussing options to traditional regulatory approach for resolving environmental and land use challenges). A community facing rapid development, however, may see those options vanish before it can act. It may be too late to save a farm by purchasing its development rights, or to preserve the historical character of an old neighborhood by attracting the interest of the right nonprofit group. A temporary moratorium may make such creative solutions – solutions that satisfy individual property owners and the community – possible.

C. Temporary moratoria are already subject to reasonable limitations that protect property owners.

Although temporary moratoria have long been a part of the land use planning process, planning officials have not had free reign to impose unreasonable or

unjustified moratoria. Both the lower courts and state legislatures have placed reasonable limits on temporary moratoria that serve to protect the interests of property owners. *See generally* Rohan, 3 *Zoning and Land Use Controls* §§ 22.02, 22.03 (discussing validity and constitutionality of temporary moratoria).

An obvious limit is that temporary moratoria must, in fact, be temporary. Going beyond constitutional requirements, several states place specific statutory limits on the length of development moratoria. *See, e.g.*, Colo. Rev. Stat. § 30-28-121 (2001) (moratoria not to exceed six months); Mont. Code Ann. § 76-2-306 (six months plus one to two year extension) (2001); Or. Rev. Stat. § 197.520 (1999) (120 days plus six-month extension). In the absence of a statutory limit, courts have generally reasoned that a "suspension or limitation [on development] may be imposed only for a reasonable time." Young, 1 *Anderson's American Law of Zoning* § 5.24, at 449. For example, the Wyoming Supreme Court, while recognizing that an interim freeze may be valid, also warned that municipalities could not "act so lethargically as to effectively confiscate private property." *Schoeller v. Board of County Comm'rs*, 568 P.2d 869 (Wyo. 1977). Other courts have not hesitated to invalidate a moratorium of unreasonable duration. *See Lakeview Apartments v. Town of Stanford*, 485 N.Y.S.2d 801 (N.Y. App. Div. 1985).

What is reasonable, of course, depends upon the context. As the Supreme Court of New Jersey has recognized, there is no "inflexible rule" but "[e]ach situation must be assayed in its own particular factual setting." *Schiavone Constr. Co. v. Hackensack*

Meadowlands Dev. Comm'n, 486 A.2d 330, 331 (N.J. 1985) (quoting *Deal Gardens v. Loch Arbour*, 226 A.2d 607 (N.J. 1967)). One relevant factor may be the "time required to reach and implement a final decision as to the ultimate use of the property." *Id.* at 333. In any event, the inquiry is fact-specific. *See id.* (remanding for further factual development where temporary moratorium lasted significantly longer than the lower court had predicted).

Courts have also considered the purpose of a moratorium, and whether planning officials are acting in good faith. *See, e.g., Smoke Rise*, 400 F. Supp. at 1384 ("it is important to examine whether the sewer moratoria orders have been implemented for the primary purpose of achieving other objectives which are not permissible"); Rohan, 3 *Zoning & Land Use Controls* § 22.039[3], at 22-49 (interim controls may be deemed takings if the justification is inadequate or if the municipality takes no steps to cure the problem it faces). A Rhode Island district court invalidated a building moratorium after finding that the Town had not "acted reasonably and in good faith" to alleviate the sewer problems that prompted the ban. *Q.C. Constr. Co. v. Gallo*, 649 F. Supp. 1331, 1338 (D. R.I. 1986). The court acknowledged that a moratorium may be constitutional in some circumstances, but noted that in this case, the moratorium was not part of a plan to remedy the Town's sewer problems and was not time-limited. *Id.* at 1337-38. In another sewer case, New York's high court held that a town could not impose a moratorium on multifamily units based on the town's own failure to address a longstanding pollution problem. *Westwood Forest Estates v. Village of South Nyack*, 244 N.E.2d 700, 702-03 (N.Y. 1969). The court acknowledged that a reasonable, limited moratorium on building permits might be appropriate, but found that the town acted inappropriately in these circumstances. *Id.*

These cases show that the existing legal framework, including existing takings law and the basic due process requirement of reasonableness, provides sufficient restrictions on the use of temporary moratoria. One scholar summarizing the law governing moratoria states that municipalities are obligated to "maintain [a] freeze for only so long as necessary and to expeditiously plan and put into effect a permanent scheme. If a municipality fails to do that, an ordinance may be declared unconstitutional on substantive due process grounds or as a taking." Rohan, 3 *Zoning & Land Use Controls* § 22.03[2], at 22-41. Most planning authorities adhere to this standard; where they fail to do so, the aggrieved property owners have resort to the courts for a remedy. As long as this is the case, there is no need for a categorical rule treating all temporary moratoria as *per se* takings – a rule that would eliminate a critical planning tool and jeopardize the planning process in many communities.

II. THIS COURT'S PRECEDENTS DO NOT SUPPORT A CATEGORICAL TAKINGS RULE FOR TEMPORARY MORATORIA

Just last term, this Court reaffirmed that regulatory takings claims are generally analyzed under

the balancing test set forth in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). *See Palazzolo v. Rhode Island*, 121 S. Ct. 2448, 2457, 2464-65 (2001) (where property owner failed to establish a deprivation of all economic value, his claim should properly be examined under *Penn Central*); *id.* at 2466 (O'Connor, J., concurring) ("our polestar . . . remains the principles set forth in *Penn Central* itself"). Petitioners, however, reject the established *Penn Central* test and instead seek a brand-new categorical rule that deems any short-term prohibition on development a *per se* taking – regardless of the regulation's purpose, duration, or effect on property values.[2]

In support of this argument, petitioners and their amici attempt to draw on the two narrow circumstances in which the Court has recognized a categorical taking: where a regulation "compel[s] the property owner to suffer a physical 'invasion' of his

[2] Because of the strategic choices they made below, petitioners can no longer assert a takings claim under *Penn Central*. At trial, they made a "calculated choice" to focus on the categorical takings argument, and did not introduce specific evidence of economic impact that would have been relevant to a *Penn Central* claim. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 34 F. Supp. 2d 1226, 1241 (D. Nev. 1999). They did not appeal the district court's ruling that there was no taking under *Penn Central*. *See Tahoe-Sierra Preservation Council*, 216 F.3d at 773 ("the plaintiffs have stated explicitly on this appeal that they do not argue that the regulations constitute a taking under the ad hoc balancing approach described in *Penn Central*"). In light of this procedural background, petitioners properly did not raise a *Penn Central* claim in their petition for certiorari or their opening brief.

property," or where a regulation "denies all economically beneficial or productive use of land." *Lucas*, 505 U.S. at 1015. They also suggest that the Court's decision in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) requires a holding that any development moratorium is a *per se* taking.

Petitioners' reasoning is flawed, however. First, they blur the analytical lines separating physical and regulatory takings. Second, they misconstrue this Court's reasoning in *Lucas*, a decision that in no way supports a categorical takings rule for temporary moratoria. And finally, they ignore the limited reach of the Court's holding in *First English*.

A. Petitioners fail to understand the sharp distinction between physical and regulatory takings.

By pressing their case for a categorical rule, petitioners seek to distract this Court from two critical issues: first, that temporary moratoria serve reasonable and important public purposes, and second, that temporary moratoria often have a minimal impact on property values. Both of these issues are fundamental to any regulatory takings claim. *See Penn Central*, 438 U.S. at 124-25. Rejecting *Penn Central*, however, petitioners instead draw substantially on the reasoning of cases involving physical invasions of private property. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (regulation requiring landlords to accept installation of cable wires on buildings constituted a

"permanent physical occupation"); *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979) ("imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina"). In so doing, they ignore the critical distinctions between physical and regulatory takings.

The Court's decision in *Loretto*, in particular, makes clear that, for purposes of the Takings Clause, a physical invasion or occupation is entirely distinct from other types of land use regulations. "[W]e have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause." *Loretto*, 458 U.S. at 426. The Court's reasoning in *Loretto* is wholly focused on the "unique" context of a physical occupation of property, "where the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation." *Id.* at 432, 441. The Court emphasized not the potential economic injury to the property owner but the "special kind of injury [suffered] when a *stranger* directly invades and occupies the owner's property." *Id.* at 436. This reasoning shows unequivocally that the labels applied in a takings case do have constitutional significance. *Cf.* Pet. Br. 15. Physical takings are different, and the principles that govern them do not apply to ordinary regulatory takings.

Petitioners cite *Loretto* and *Kaiser* in part for the proposition that good intentions on the part of the government do not affect the requirement of just compensation. Pet. Br. 39-40. To a point, this statement is unobjectionable. If a government action is

found to work a taking, compensation is constitutionally required, regardless of the government's purpose. But the real issue in this case is not whether compensation is required for a temporary moratorium, but whether a temporary moratorium works a taking. And on that key question, *Penn Central* teaches that the "character of the governmental action" is a relevant factor. *Penn Central*, 438 U.S. at 124. A regulation that "adjust[s] the benefits and burdens of economic life to promote the common good" is not readily deemed a taking. *Id.*; *see also Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225 (1986). Thus, the public interest is always relevant to a regulatory takings claim. *See Agins v. City of Tiburon*, 447 U.S. 255, 261 (1980) (the question whether property has been "taken" in the constitutional sense "necessarily requires a weighing of public and private interests"); *see also Palazzolo*, 121 S. Ct. at 2466 ("The purposes served, as well as the effects produced, by a particular regulation inform the takings analysis.") (O'Connor, J., concurring); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485 (1987) ("[T]he character of the governmental action involved here leans heavily against finding a taking; the Commonwealth of Pennsylvania has acted to arrest what it perceives to be a significant threat to the common welfare.").

The Court in *Loretto* clarified and explained its special treatment of physical takings. *See* 458 U.S. at 434-35 ("[O]ur cases uniformly have found a taking to the extent of the [physical] occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the

owner.") But the Court also carefully distinguished its "very narrow" holding regarding physical invasions from the "substantial authority upholding a State's broad power to impose appropriate restrictions upon an owner's *use* of his property." *Id.* at 441. When challenged as takings, such ordinary restrictions on use are evaluated under *Penn Central's* balancing test, which weighs the "economic impact of the regulation" and the "character of the governmental action." *Penn Central*, 438 U.S. at 124; *Loretto*, 458 U.S. at 426. *Loretto* and other physical takings cases provide no support for a rule that a temporary ban on development is a *per se* taking.

B. The Court's narrow decision in *Lucas* does not apply to a regulatory takings claim based on a temporary development moratorium.

Setting aside physical intrusions, the only other precedent for a categorical takings rule is this Court's decision in *Lucas*. But *Lucas* was premised on an "extraordinary" and "rare" circumstance, where direct government regulation had rendered private property "valueless." *Lucas*, at 1017-18, 1020. Although petitioners rely in part on *Lucas*, the opinion does not support their position. In fact, the Court's reasoning in *Lucas* undermines the argument that the Court should create a categorical takings rule for temporary development moratoria.

The Court in *Lucas* set out several reasons for its rule that a regulation that deprives an owner of *all* economically beneficial or productive use of land is a

per se taking. First, when the government imposes such a drastic limitation on land use, "it is less realistic to indulge our usual assumption that the legislature is simply 'adjusting the benefits and burdens of economic life' in a manner that secures an 'average reciprocity of advantage' to everyone concerned." *Id.* at 1017-18 (citations omitted) (quoting *Penn Central*, 438 U.S. at 124, and *Pennsylvania Coal*, 260 U.S. at 415). Second, the practical concern – that the government could not function if it had to pay for every change in the law that affected property values – does not apply to the "relatively rare" circumstance where a property owner is deprived of "all economically beneficial uses." *Id.* at 1018. And finally, "regulations that leave the owner of land without economically beneficial or productive options for its use . . . carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm." *Id.*

Taken together, these three concerns led the Court to conclude that a landowner suffers a taking where he is "called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle." *Id.* at 1019. None of these concerns, however, supports the conclusion that a temporary development moratorium is a *per se* taking.

First, temporary moratoria, like other ordinary land use regulations, do provide reciprocal benefits to property owners. Moratoria aid the planning process – and good municipal planning, in turn, increases property values and improves the quality of life.

Although a given property owner may suffer some economic harm due to a short-term ban on development, that property owner will eventually benefit from well-designed traffic patterns, functioning municipal services, and attractive, environmentally sound development. *Cf. Agins*, 447 U.S. at 262 ("zoning ordinances benefit the [property owners] as well as the public by serving the city's interest in assuring careful and orderly development of residential property with provision for open-space areas"); *Penn Central*, 438 U.S. at 134-35 (New York City's landmark preservation law benefits all New York citizens, including owners of Grand Central Terminal, "both economically and by improving the quality of life in the city"). The property owner will also benefit from the opportunity for public participation. "[T]hough landowners may chafe at the severity of a temporary limitation on use, they benefit by receiving a greater opportunity to challenge the possible imposition of permanent restrictive measures." Rohan, 3 *Zoning & Land Use Controls* § 22.01[1], at 22-5.

Second, a decision that every temporary moratorium is a taking would have a significant practical impact on land use planning. Land use is a "constantly evolving and continuously changing phenomenon." Freilich, 49 J. Urban L. at 65. Governments and citizens need time to respond to urgent or unexpected problems. Short-term moratoria provide needed breathing space and permit government officials to do their jobs properly instead of making snap decisions about complicated problems. In this way, short-term moratoria are entirely different in

kind from the permanent ban on development at issue in *Lucas*.

Third, short-term moratoria do not pose the risk that the government is in fact attempting to use private property to serve a public purpose, without paying the required charge. A six-month or one or two year ban on development does not transform private property into a nature preserve or a protected viewshed. *Cf. Lucas*, 505 U.S. at 1018-19 (suggesting that regulations that require land to be left in its natural state are the equivalent of scenic or conservation easements). Indeed, the property at issue may soon be used for a shopping mall or a residential subdivision. In the context of a typical short-term moratorium, the public gains no specific benefit or use from the affected property, but only the common benefit of sufficient time for study and planning purposes.

The driving concern underlying the Court's takings jurisprudence is fairness. The purpose of the Takings Clause "is to prevent the government from 'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Palazzolo v. Rhode Island*, 121 S. Ct. 2448, 2457-58 (2001). In *Lucas*, the Court acknowledged that where the government deprives a property owner of all economic value, fairness demands compensation. But the Court has also recognized that it is fair – in fact, it is a necessary part of life in an organized society – to expect property owners to absorb fluctuations in value caused by government actions. *See Agins*, 447 U.S. at 263 n.9 ("Mere fluctuations in

value during the process of government decision-making, absent extraordinary delay, are incidents of ownership. They cannot be considered as a taking in the constitutional sense.") (internal quotation marks omitted). Far from being categorically unfair, temporary moratoria generally serve important public goals that benefit all citizens, including affected property owners, and they do so without drastically affecting property values.

C. *First English* does not require a holding that any temporary moratorium is a *per se* taking.

Perhaps recognizing that a temporary moratorium on use is akin to neither a physical intrusion nor a total deprivation of value, petitioners also attempt to rely on this Court's decision in *First English*. In so doing, however, they significantly distort the holding of the case. The Court in *First English* quite specifically addressed the "remedial question" of appropriate compensation for a taking. 482 U.S. at 311. After several attempts, the Court finally reached, and reversed, California's longstanding rule that money damages were not available as compensation for a regulatory taking. *See id.* at 310-11 (noting that the Court had been unable to reach the remedial question in several earlier cases). But the Court carefully limited its holding to the issue of remedy: "[w]e merely hold that *where the government's activities have already worked a taking of all use of property*, no subsequent action by the government can relieve it of the duty to provide compensation for the

period during which the taking was effective." *Id.* at 321 (emphasis added).

Thus, although petitioners emphasize that the ordinance at issue in *First English* was a temporary moratorium, that fact is entirely irrelevant to the Court's holding. The Court did not consider whether the challenged ordinance had in fact worked a taking of property; indeed, the Court expressly refused the County's suggestion that it decide the takings claim on the merits. *See id.* at 313 ("We accordingly have no occasion to decide whether the ordinance at issue actually denied appellant all use of its property."). Although petitioners seek to examine *First English* "in the context" of the underlying claim, Pet. Br. 32, the Court itself made clear that the underlying allegations did not bear on the Court's holding.

First English establishes that a regulatory taking may be "temporary," in that the government may rescind a regulation *after* it has worked a taking of property. 482 U.S. at 310 (describing a temporary regulatory taking as a regulatory taking that is "ultimately invalidated by the courts"). But *First English* does not decide the question presented in this case: whether a moratorium designed to be temporary *necessarily* works a taking. Petitioners obscure this critical distinction by focusing on the facts, rather than the holding, of *First English*.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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